

2010 WL 5857657 (Mich.) (Appellate Brief)  
Supreme Court of Michigan.

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,

v.

Cecil D. HUSTON, Jr., Defendant-Appellee.

No. 141312.

November 23, 2010.

Appeal from the Court of Appeals Deborah A. Servitto, E. Thomas Fitzgerald, and Jane M. Beckering, J.J.

**Brief on Appeal - Appellant**

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**ORAL ARGUMENT REQUESTED**

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#### **\*iv STATEMENT OF JURISDICTION**

The Berrien County Trial Court entered judgment of sentence on February 8, 2006 (53a). The Court of Appeals reversed and remanded in a published opinion on May 13, 2010 (55a). This Court granted the People's application for leave to appeal on September 29, 2010 (62a).

This Court has jurisdiction over this appeal pursuant to [MCL 600.215\(3\)](#) and [MCR 7.301\(A\)\(2\)](#).

#### **\*V STATEMENT OF QUESTION PRESENTED**

A criminal offender receives 15 points under Offense Variable 10 of the statutory sentencing guidelines if the offender engages in predatory conduct and the victim is vulnerable. Vulnerability is simply defined as a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation. Did the Court of Appeals err in adding a restriction to this definition that precludes consideration of the victim's circumstances, such as isolation, lack of escape avenues, and being outnumbered?

Plaintiff-Appellant answers: "Yes."

Defendant-Appellee answers: "No."

The Court of Appeals answered: "No."

#### **\*1 STATEMENT OF FACTS**

Defendant pled guilty to armed robbery, [MCL 750.529](#), before Berrien County Trial Court Judge Dennis M. Wiley (12a-26a). Judge Wiley sentenced defendant to 15 to 50 years' imprisonment and to pay costs and restitution (50a-52a, 53a).

Defendant admitted that on February 18, 2005, he and Keyon Brown approached a woman in the parking lot of Sears from behind, threatened her with BB guns that looked like real guns, took her car keys and purse, and drove away in her car (20a-25a). In exchange for defendant's plea, his agreement to make restitution in other cases, and his agreement to testify against Brown, the prosecutor dropped a charge of carjacking and charges in eight other cases, several of which involved breaking and entering of a building (18a, 26a-29a).

The pre-sentence investigation report, pages 1-2, described the armed robbery as follows:

According to a police report submitted by the Benton Township Police Department, officers were dispatched to the parking lot of the Sears store located at the Orchards Mall in Benton Harbor, Michigan. Upon arrival officers made contact with the victim in this case, Jackie Flanagan. Jackie stated she had pulled into the parking lot of Sears where she parked by the hardware entrance.

Flanagan stated she exited her vehicle and was approached by two black males who appeared to be teenagers. Flanagan stated one of the individuals pulled a gun on her and stuck the gun in her face and demanded her purse, wallet and car keys. Flanagan stated the second individual walked behind her and put something to her head which also felt like a gun. Flanagan stated she gave the individual in front of her, her cell phone and car keys. Flanagan stated she had her purse around her shoulder and neck and had a hard time getting the purse off her body. According to Flanagan, she was pushed down onto the ground where she hurt her left hip and skinned her left knee. The individuals then fled in her vehicle. Later that day officers recovered the vehicle on the corner of Wacanda Avenue and North Fair. Inside the vehicle there were two pistols which turned out to be BB guns. Further investigation led to the defendant and co-defendant, Keyon Brown. It is noted the defendant confessed to the crime.

\*2 Defendant objected to the scoring of 15 points for predatory conduct under Offense Variable (OV) 10 (34a). The trial court characterized defendant's and Brown's actions as "lying in wait" and found that they fit the definition of predatory conduct (37a).

The victim, Jackie Flanagan, addressed the court and related that she was at the mall to return a doll she had bought for her daughter (42a). She said that defendant and Brown "snuck out of the bushes on a dark winter's evening" and attacked her in a dark parking lot (38a-39a). When they pushed her down, they cut her purse from her body with a box cutter (38a-40a, 42a).

Addressing defendant, Ms. Flanagan stated, "You snuck up on me that night with a gun" (39a). Later, she added:

And I parked safely under a street lamppost because I circled the parking lot and I'm sure that's when you and your accomplice saw me driving around, probably saw me by myself and said, look, let's get her. The minute I stepped out of my vehicle and locked it securely, had this purse . . . , that's when you and your partner came up on me and you both verbally said, Give us your things or we will kill you, bitch. . . . [40a]

Ms. Flanagan also pointed out that when the crime occurred, there was no one else around (41a). Near the end of her statement, she said:

Obviously I don't know if this was a well thought-out plan. Not real sure about that. But I knew - do know you predatorily attacked me. You were waiting. You saw me obviously circle the parking lot 'cause I did circle it and I got in a front row space right under a light because I felt that would be a safe location. Obviously, I was wrong. . . . [41a-42a]

Defendant appealed the scoring of OV 10 to the Court of Appeals, which denied his delayed application for leave (Order, 12/09/08) and his motion for reconsideration (Order, 1/28/09). Defendant applied for leave to appeal to this Court, which, in lieu of granting leave, remanded to the Court of Appeals "for consideration as on leave granted of the challenge to the scoring of Offense Variable 10, [MCL 777.40](#), in light of *People v Cannon*, 481 Mich 152 (2008)." *People v Huston*, 485 Mich 885; 772 NW2d 418 (2009) (54a).

\*3 On remand, the Court of Appeals reversed. The Court agreed with the trial court's finding that defendant was "lying-in-wait" until "a choice victim appeared" (58a). The Court of Appeals also stated that defendant had chosen a "specific" victim. As the Court put it, "[T]his was not a random attack on anyone in the parking lot but a planned attack on an individual perceived to be weak" (59a). The Court further observed that defendant "[took] advantage of the fact that it was dark and no one else was in the parking lot. The darkness and the isolation may have made the robbery easier because the victim was less likely to resist physical restraint and there was no one to come to the victim's aid" (60a).

Nonetheless, the Court of Appeals reversed, finding that Ms. Flanagan was not "inherently" vulnerable. Rather, said the Court, her vulnerability was based on the timing of the attack (at night) and Ms. Flanagan's location (an isolated parking lot, outside Ms. Flanagan's locked car) (59a). According to the Court, *Cannon* required that predatory conduct under OV 10 be based on a finding that the victim was "personally" or "inherently" vulnerable, without regard to the circumstances in which the victim found herself (59a-60a). Since the record did not show whether defendant and his accomplice were greater in size and strength than Ms. Flanagan (59a n 1), and there was no other indication that Ms. Flanagan possessed an inherent vulnerability, the Court

of Appeals held that the score of 15 points was improper (60a). Because subtracting those 15 points changed the applicable sentencing guideline range, the Court remanded for resentencing (60a).

The People applied for leave to this Court. This Court granted the People's application "to consider whether 'vulnerability' of a victim includes consideration of the victim's surrounding circumstances at the time of the offense, or is limited to the victim's personal characteristics" (62a).

#### \*4 ARGUMENT

**A criminal offender receives 15 points under Offense Variable 10 of the statutory sentencing guidelines if the offender engages in predatory conduct and the victim is vulnerable. Vulnerability is simply defined as a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation. The Court of Appeals erred in adding a restriction to this definition that precludes consideration of the victim's circumstances, such as isolation, lack of escape avenues, and being outnumbered.**

**Standard of Review.** The interpretation of the statutory sentencing guidelines is reviewed de novo. [People v McGraw](#), 484 Mich 120, 123; 771 NW2d 655 (2009).

By holding that vulnerability can only arise from a personal characteristic of the victim rather than from circumstances, the Court of Appeals placed a constraint on the definition of vulnerability that does not appear in OV 10. The Court of Appeals thereby eliminated scoring for obvious instances of predatory conduct, such as stalking, luring a victim into danger, and lying in wait, that make use of the victim's circumstances rather than an inherent quality of the victim. This is not what the Legislature intended when it enacted a statute designed to increase punishment for offenders who engage in predatory behavior.

**A. The language and purpose of MCL 777.40 do not limit the vulnerability of a victim to the victim's inherent qualities.**

[MCL 777.40](#) has not been amended since it was enacted in 1998. It provides:

(1) Offense variable 10 is **exploitation** of a vulnerable victim. Score offense variable 10 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

(a) Predatory conduct was involved ... 15 points

(b) The offender **exploited** a victim's physical disability, [mental disability](#), youth or agedness, or a domestic relationship, or the offender abused his or her authority status ... 10 points

(c) The offender **exploited** a victim by his or her difference in size or strength, or both, or **exploited** a victim who was intoxicated, under the influence of drugs, asleep, or unconscious ... 5 points

(d) The offender did not **exploit** a victim's vulnerability ... 0 points

**\*5** (2) The mere existence of 1 or more factors described in subsection (1) does not automatically equate with victim vulnerability.

(3) As used in this section:

(a) "Predatory conduct" means preoffense conduct directed at a victim for the primary purpose of victimization.

- (b) “**Exploit**” means to manipulate a victim for selfish or unethical purposes.
- (c) “Vulnerability” means the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation.
- (d) “Abuse of authority status” means a victim was **exploited** out of fear or deference to an authority figure, including, but not limited to, a parent, physician, or teacher.

When construing a statute, this Court's primary goal is “to ascertain and give effect to the intent of the Legislature.” *People v Pasha*, 466 Mich 378, 382; 645 NW2d 275 (2002). The Court begins by examining the language of the statute. *People v Phillips*, 469 Mich 390, 395; 666 NW2d 657 (2003). This Court will “ ‘read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.’ ” *Id.*, quoting *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002).

MCL 777.40 prescribes a score of 15 points where predatory conduct is involved. It defines predatory conduct as “preoffense conduct directed at a victim for the primary purpose of victimization.” Plainly, this definition contains no requirement that the victim bear some inherent vulnerability.

This Court in *Cannon*, however, interpreted all of MCL 777.40, including subsection (1)(a), in light of the statute's first sentence: “Offense variable 10 is **exploitation** of a vulnerable victim.” *Cannon*, 481 Mich at 157. Thus, even though subsection (1)(a) does not refer to **exploitation** or vulnerability, this Court held that points cannot be assessed under any part of OV \*6 10 unless it is readily apparent that the victim was vulnerable. *Id.*, 157-158. More specifically, preoffense conduct directed at a victim for the primary purpose of victimization does not constitute “predatory conduct” warranting a score of 15 points unless the definition of “vulnerability” in subsection (3)(c) is met. The Court framed three analytical questions to aid lower courts in determining whether 15 points could be assessed under OV 10:

- (1) Did the offender engage in conduct before the commission of the offense?
- (2) Was this conduct directed at one or more specific victims who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation?
- (3) Was victimization the offender's primary purpose for engaging in the preoffense conduct? [*Id.*, 161-162.]

But this Court made quite clear that vulnerability, for purposes of “predatory conduct” under subsections (1)(a) and (3)(a), is not limited to the personal factors listed in subsections (1)(b) and (c):

The absence of one of these factors does not preclude a finding of victim vulnerability when determining whether it is appropriate to assess 15 points for predatory conduct. Rather, the evidence must show merely that it was readily apparent that the victim was susceptible to injury, physical restraint, persuasion, or temptation. MCL 777.40(3)(c). [*Cannon, supra*, 481 Mich at 158 n 11.]

This Court's point in footnote 11 of *Cannon* is in accord with the structure of MCL 777.40. In subsections (1)(b) and (c), the Legislature listed particular kinds of vulnerability that might pertain to a particular victim. In subsection (1)(a), however, the Legislature required only predatory conduct, without limiting the source or nature of the vulnerability **exploited** by the offender. This difference in language should be construed as intentional, just as the difference between subsections (1)(b) and (1)(c) should be construed as intentional. Although subsections (1)(a), (b), and (c) all require victim vulnerability pursuant to *Cannon*, they are independent of each other.

\*7 The statute's history also supports this distinction. Most of the substance of [MCL 777.40](#), including the list of specific victim characteristics now found in [MCL 777.40\(1\)\(b\)](#) and (c), was taken almost verbatim from Offense Variable 7 of the former judicial sentencing guidelines. Michigan Sentencing Guidelines, 2d ed, 1988, West, p 27 (attached). The provision for scoring predatory conduct and the definition of predatory conduct, however, are entirely new additions by the Legislature, which made no attempt to define predatory conduct in terms of the bases for **exploitation** listed in subsections (1)(b) and (c).

The Court of Appeals essentially ignored this difference in this case. That Court observed that the factors listed in subsections (1)(b) and (c) focused on the victim, not the victim's circumstances. The Court then grafted that focus onto the definition of predatory conduct in subsection (3)(a) (59a). That is not how the statute is written.

Nor is it in keeping with the legislative goal to increase the punishment for calculating offenders. The distinction between subsection (1)(a) - with its attendant definition of predatory conduct in subsection (3)(a) - and subsections (1)(b) and (c) suggests a change in focus. It implies that where predatory conduct is involved, the Legislature wished to punish the offender for the calculated nature of the **exploitation**, regardless of the source of the victim's vulnerability. Indeed, as discussed below, when an offender engages in "preoffense conduct directed at a victim for the primary purpose of victimization," the offender often *creates* and **exploits** vulnerability by manipulating the victim's circumstances.<sup>1</sup>

**\*8 B. The Court of Appeals' decision effectively eliminates scoring for many common types of predatory conduct, recognized by Michigan courts, that do not depend on an inherent quality of the victim to **exploit** the victim's vulnerability.**

Since its enactment, this Court and the Court of Appeals have construed [MCL 777.40](#) to award points for predatory conduct that **exploits** a victim's circumstantial vulnerability. Indeed, some of the most common kinds of predatory behavior depend on circumstances rather than on any inherent trait of the victim:

- **Stalking.** An offender lurks in the shadows outside a nightclub. He observes someone emerge alone and walk down the street. He follows the victim at a distance for half a mile until the victim turns onto a street with dimmer light and less traffic. Then he assaults and robs the victim.

Plainly, this offender has engaged in predatory conduct - preoffense conduct directed at his victim for the primary purpose of victimization. Further, he has **exploited** the victim's vulnerability - a "readily apparent susceptibility ... to injury [or] physical restraint." He has chosen a time and a place where his victim is alone. Yet under the Court of Appeals' reasoning in *Huston*, this offender must receive zero points under OV 10 because he has not **exploited** any of his victim's personal characteristics. He has relied solely on location, isolation, and the time of day. According to *Huston*, this victim was not vulnerable, which would be a surprise to anyone familiar with the word "vulnerable," either as defined by [MCL 777.40\(3\)\(c\)](#) or as an everyday word. Like the United States Supreme Court, this Court should be "very wary" of a statutory construction that is "just what the English language tells us not to expect." *Lopez v Gonzalez*, 549 US 47, 54; 127 S Ct 625; 166 L Ed 2d 462 (2006).

In fact, the above scenario is essentially what happened in a case where the Court of Appeals held that the defendant properly received 15 points under OV 10. In \*9 *People v Kimble*, 252 Mich App 269, 272; 651 NW2d 798 (2002), *aff'd* 470 Mich 305; 684 NW2d 669 (2004), the defendant fatally shot a woman in an attempt to steal the wheel rims from the car she was driving. Upholding a score of 15 points under OV 10, the Court of Appeals observed that the defendant and his accomplices had driven around for hours, looking for a car to steal in order to remove and sell its wheel rims. *Id.*, 274. When they saw the victim driving such a car, they followed her home, watched her pull into a driveway, and shot her. *Id.*, 274-275. Seeking out a victim and following her constituted predatory conduct. *Id.*, 275.

Similarly, in *People v Witherspoon*, 257 Mich App 329, 330; 670 NW2d 434 (2003), the defendant was convicted of second-degree criminal sexual conduct for sexually assaulting a nine-year-old girl. The defendant challenged the trial court's finding of predatory conduct and the resulting 15-point score under OV 10. *Id.*, 334-335. The Court of Appeals affirmed. Although the



victim's age and size might well have formed a basis for finding vulnerability in *Witherspoon*, they were not what the Court of Appeals relied on. Instead, the Court noted:

The third grader testified that when no one else was present and she was folding clothes in the basement, defendant approached her and committed the sexual assault. We conclude that the *timing* of the assault (when no other persons were present) and its *location* (in the isolation and seclusion of the basement) are evidence of preoffense predatory conduct. Like *Kimble*, ... it may be inferred from the evidence that defendant *watched* his victim and *waited* for any opportunity to be alone with her in an isolated location. On the basis of this evidence, the trial court's scoring of OV 10 at fifteen points for predatory conduct was not clearly erroneous. [*Id.*, 336 (emphasis in original).]

**\*10** The People cited *Kimble* and *Witherspoon* in the Court of Appeals in the instant case, but that Court dismissed those cases in a footnote by observing that they pre-dated *Cannon*.<sup>2</sup> *Huston*, *supra*, slip op p 6 n 2. *Cannon*, however, did not overrule *Kimble* or *Witherspoon*. In fact, this Court in *Cannon* cited *Kimble* as an instructive illustration of preoffense conduct directed at a victim. *Cannon*, *supra*, 481 Mich at 160.

• **Luring.** A variation of stalking, luring involves the inducement of a victim to leave a place of relative safety so that he or she is easier to victimize. For example, a perpetrator might pretend to be having car trouble alongside the road so that a Good Samaritan will stop his or her own car to help, thus facilitating a carjacking, robbery, or assault.<sup>3</sup>

The offender engaged in luring in *People v Walton*, unpublished opinion per curiam of the Court of Appeals, issued April 10, 2010 (Docket No. 289212) slip op p 2:

**\*11** Before assaulting the victim, defendant befriended her at the Post Bar and gained her trust. He then lied to her regarding the availability of her car in order to render her vulnerable and manipulate her acceptance of a ride with him. Once in defendant's vehicle, defendant used the opportunity to drive the victim to an isolated, unfamiliar area and sexually assault her. Because such behavior constitutes, by definition, predatory conduct, the trial court did not abuse its discretion in assessing defendant 15 points on [OV 10].

Luring, like stalking, is preoffense conduct directed at a victim for the primary purpose of victimization. And again, this conduct need not rely on any *inherent* vulnerability of the victim. The offender creates the vulnerability by drawing the victim from a place of relative safety into a trap. Yet according to the Court of Appeals in *Huston*, there is nothing predatory about this conduct.

• **Lying in wait.** Still another common means of using circumstances such as isolation to create vulnerability is the expedient of lying in wait. The offender simply hides until the unsuspecting victim approaches. This was the means used in the instant case: Defendant waited in some bushes at night until Ms. Flanagan had exited her car, locked it behind her, and walked away from it. The Court of Appeals agreed that “[c]hoosing a lone and isolated victim was akin to focusing on the weakest antelope in the herd. Defendant waited for such a circumstance before he seized the opportunity to attack” (59a). Defendant further increased Ms. Flanagan's vulnerability by acting with an accomplice, thereby outnumbering his victim.

A panel of the Court of Appeals held recently (*post-Huston*) that vulnerability underlying predatory conduct can arise from circumstances created by the offender's lying in wait rather than from a victim's inherent characteristics. In *People v Herp*, unpublished opinion per curiam of the Court of Appeals, issued June 22, 2010 (Docket No. 291484), the defendant hid in the back seat of his ex-girlfriend's car while she was in a store, then attacked her after she got into **\*12** the car and tried to keep her there. Citing *Cannon*, the Court of Appeals held that both the victim's vulnerability and the predatory nature of defendant's conduct had been established:

Vulnerability is established by proof of “readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation.” MCL 777.40(3)(c); see also *Cannon*, 481 Mich at 158 n 11. Here, the evidence showed that defendant got into

the back seat of the victim's car after she went into a store. He then waited for her to return, and, after she got into the car, he tried to pin her in the small, readily controlled confines of the car - that is, **defendant waited until the victim was in a particularly vulnerable position** before attempting to abduct her. Accordingly, there was evidence that defendant **exploited** the victim's susceptibility to restraint.

We also reject defendant's argument that his behavior was not predatory. The *Cannon* Court defined predatory conduct under OV 10 as preoffense behavior "directed at a person for the primary purpose of causing that person to suffer from an injurious action or to be deceived." *Cannon*, 481 Mich at 161. The trial evidence established that defendant entered the back seat of the victim's car, concealing himself until she returned to the car. This deception was sufficient to assess 15 points against defendant for predatory conduct under OV 10. [*Herp*, slip op p 2 (emphasis added).]

The panel in *Herp* recognized what the panel in *Huston* failed to recognize: that the location and circumstances of the crime are relevant not only to determine whether an offender has engaged in predatory conduct, but also to determine whether the victim was vulnerable. The *Huston* panel not only misconstrued MCL 777.40 in reaching the opposite conclusion, it also erred in its understanding that *Cannon* compelled this result.

At least three members of this Court have also observed that lying in wait constitutes predatory conduct. In *People v Mahon*, 485 Mich 971; 774 NW2d 691 (2009), this Court denied the prosecutor's application for leave from the Court of Appeals' vacation of the defendant's sentences. Justice Corrigan concurred in the denial because the defendant's agreement, on remand, to the previously imposed sentences rendered the issue moot. But she wrote that the Court of Appeals had erred in holding that the trial court should have scored zero points under OV 10.

**\*13** An employee of TJ's lounge asked defendant to leave the establishment around 11:00 p.m. because he was drunk. Defendant told the employee that he was "going to come back and get revenge" on her. At 2:30 a.m., the employee and two of her coworkers walked out of TJ's at the end of their shift. Defendant was waiting outside the front door with a loaded rifle. He ordered them back inside the bar at gunpoint. Defendant stated, "I told you I would be back for revenge." **Under the circumstances, the victims were vulnerable. Defendant accosted them when they were leaving the bar at 2:30 a.m. when it was dark and most people were likely gone because the bar was closed. Rather than confronting the victims in the bar, defendant waited until they were outside when they were isolated and susceptible to injury. Given these circumstances,** the Court of Appeals erred in concluding that OV 10 should have been scored at zero points. [*Id.* (emphasis added).]

Justice Corrigan's concurrence was joined by Justices Young and Markman. *Id.*

There are many other variations by which circumstances may be manipulated to create vulnerability, often by isolating the victim. See *People v Champlain*, unpublished opinion per curiam of the Court of Appeals, issued January 20, 1009 (Docket No. 276447) slip op p 4 (defendant prearranged a meeting with the victim at the victim's house at a time when the victim's mother would not be home); *People v Parr*, unpublished opinion per curiam of the Court of Appeals, issued October 13, 2009 (Docket No. 284715) slip op p 3 (defendant, a massage therapist, changed the schedule of the victim's appointment to induce the victim's mother to leave the premises). Stalking, luring, and lying in wait are simply some of the most common variations. What they share is the offender's reliance on, or creation of, circumstances that render the victim vulnerable.

#### **\*14 Conclusion**

The Court of Appeals accepted the trial court's finding in this case that defendant was lying in wait (58a). The Court of Appeals further stated that defendant chose a specific victim, took advantage of darkness and Ms. Flanagan's isolation, and engaged in "a planned attack on an individual perceived to be weak" (58a-60a). The Court acknowledged that these circumstances "may have made the robbery easier because the victim was less likely to resist physical restraint and there was no one to come to the victim's aid" (60a). But despite these findings, the Court held that defendant's conduct was not predatory because the record



showed no inherent weakness in Ms. Flanagan. In so holding, the Court created a rule that is not supported by the language of [MCL 777.40](#) or the Legislature's goal of punishing calculated preoffense conduct. As the examples above show, this misguided rule carries consequences for a large number of cases in which an offender takes advantage of a victim's circumstances for the purpose of victimization. For the benefit of the bench and bar, the People ask this Court to correct this error in an opinion reversing the Court of Appeals and reinstating defendant's sentence.

### **\*15 REQUEST FOR RELIEF**

For these reasons, the People request that this Court reverse the Court of Appeals and reinstate defendant's sentence.

#### Footnotes

- 1 Although vulnerability means “the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation,” the Legislature did not state that this susceptibility must exist before the offender undertakes any preoffense conduct. It is frequently the case that the preoffense conduct brings about the susceptibility.
- 2 Instead of following *Kimble* and *Witherspoon*, the Court of Appeals relied on three unpublished opinions issued after *Cannon* for the proposition that vulnerability must be personal for predatory conduct to exist (59a-60a). Of these, two at least do not support that proposition. In *People v Comtois*, unpublished opinion per curiam of the Court of Appeals, issued December 29, 2009 (Docket No. 286965), slip op pp 3-4, the Court observed that the defendant had engaged in preoffense conduct and that the victim had an obvious mental impairment; the Court therefore had no occasion to decide whether the defendant's leading of the victim to a “desolate area” would have qualified as predatory conduct absent that impairment. In *People v Murphy*, unpublished opinion per curiam of the Court of Appeals, issued December 22, 2009 (Docket No. 286016), slip op p 4, the Court similarly noted that the defendant had watched and followed the victim and that the victim was **elderly** and frail; the Court did not decide whether following a young and healthy victim in the same circumstances would have been predatory conduct. Only in *People v Miller*, unpublished opinion per curiam of the Court of Appeals, issued February 16, 2010 (Docket No. 287859) slip op pp 7-8, did the Court commit the same errors that it did in *Huston*: inferring that vulnerability must be based on a personal characteristic of the victim and that the location and timing of the assault related only to whether the defendant had committed preoffense conduct.
- 3 While this Court stated that predatory conduct must be directed at a “specific” victim, *Cannon*, 481 Mich at 162, the statute (which does not use the word “specific”) does not preclude the possibility that preoffense action may be directed at a victim whose identity is not specified before the event. The victim's identity would not normally be known beforehand, for example, in the case of a “Good Samaritan” trap, or in the case of a mugger waiting in a dark alley.